Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Qwest Communications	)	**WC Docket No. 02-148**
International, Inc.	)	
	)	
Consolidated Application for Authority	)	
To Provide In-Region, InterLATA Services in	)	
Colorado, Idaho, Iowa, Nebraska	)	
And North Dakota	)	

REPLY COMMENTS OF TOUCH AMERICA, INC.

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Table of Contents

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REPLY COMMENTS OF TOUCH AMERICA, INC.

Pursuant to the Commission's August 21, 2002 Public Notice in the above-referenced proceeding, Touch America, Inc. ("Touch America") hereby replies to the comments submitted on the recent proposal of Qwest Communications International, Inc. ("Qwest") regarding the secret agreements between Qwest and competitive local exchange carriers ("CLECs").[1]

I. INTRODUCTION AND SUMMARY

The comments make eminently clear that the secret agreements have materially corrupted the record in this proceeding and the entire 271 process and, therefore, that Qwest's 271 Application must be denied.[2] The record demonstrates that Qwest's actions of offering secret deals to certain competitors, to the exclusion of others, fundamentally tainted the third-party testing process by the inclusion of the data of "preferred" carriers, such that the third-party test administrator cannot at this time ascertain whether the test results are representative of the "typical" CLEC experience. The impact of Qwest's actions to silence its opposition in its 271

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[1] *See* letter dated August 20, 2002 from Melissa E. Newman, Vice-President-Federal Regulatory, Qwest, to Marlene H. Dortch ("Qwest proposal").

[2] Since the secret agreements also corrupt the record in WC Docket No. 02-189, the Application that is the subject of that proceeding must likewise be denied.

proceedings, particularly those few carriers with real commercial experience in the Qwest region and therefore the carriers with the most to contribute to the debate, is obvious, yet aptly demonstrated in the commenters' filings in the proceeding. As the record is irretrievably "mucked up" – all as a result of Qwest's *own* actions – the appropriate and proper remedy is denial of the Application, not some undetermined future enforcement process. Further, given Qwest's history of eluding its obligations under section 252 of the Act and the evidence that Qwest is *still* not meeting its promise to file secret agreements with the state commissions, further inquiry and investigation is necessary to ensure that all of Qwest's agreements are brought to light and made available to all competitors. Denial or delay of the approval of Qwest's Application is not an inconvenience, but a statutory mandate. Qwest has put itself in this position, through deliberate and considered business judgments, and must now be required to lie in the proverbial bed it has made.

A. The secret agreements corrupted the entire 271 process.

The Colorado Public Utilities Commission ("Colorado Commission") claims that denial (or delay) of the Application is not appropriate as there is no evidence that the secret agreements impacted either individual CLECs or competition in Colorado,[3] while the Washington Utilities and Transportation Commission ("WUTC") asserts a lack of evidence that the secret agreements impacted the OSS performance results.[4] The comments, however, are replete with evidence of how the secret agreements tainted the record in this proceeding – through the absence of

[3] *See* Supplemental Comments of the Public Utilities Commission of the State of Colorado ("Colorado Comments") at 5-6.

[4] *See* Comments of the Washington Utilities and Transportation Commission ("WUTC Comments") at 2. Although the State of Washington is not subject to the instant Application, in light of the fact that the WUTC filed comments, Touch America hereby responds to such comments.

participation by competitors with grievances against Qwest and the inclusion of performance data of "favored" CLECs in the testing process – including the following:

- Eschelon and McLeod, Qwest's two largest wholesale customers at the time (and likely the only two customers with experience placing UNE-P orders) were precluded through their secret agreements from bringing to the attention of regulators the problems they were experiencing with Qwest.[5]

- When Eschelon tried to bring to the attention of the third party testers certain of the problems it was having with Qwest, Qwest shut Eschelon down with threats to its business and other scare tactics.[6]

- KPMG reported that 231 of 235 (or over 98% of) orders it relied upon to determine whether Qwest was performing at parity with respect to installation intervals came from the three largest CLECs who had secret agreements with Qwest (Eschelon, Covad and McLeod).[7]

- KPMG stated that practically 100% of the resale/UNE-P observations came from one of the CLECs with a secret deal.[8]

- Qwest exclusively offered McLeod a provisioning arrangement known as "UNE-Star," which is easier for Qwest to provision than UNE-P and, because Qwest's "UNE-Star" provisioning performance was aggregated with its UNE-P performance in the KPMG test, Qwest's UNE-P results are likely to be overstated.[9]

As a result, KPMG found that there is simply no way of knowing whether the test results are "representative of the 'typical' CLEC experience, given the preferential treatment the [secret deals] CLECs may have received from Qwest."[10] Qwest's actions harmed the administrative process, the competitors who were not able to take advantage of their rivals' secret pacts and,

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5 *See* Comments of WorldCom, Inc. ("WorldCom Comments") at 16-17 (citing Eschelon's position that "participants in the state 271 proceedings did not have the benefit of explanation of Eschelon, which had first-hand experience with the [OSS] problems").

6 WorldCom Comments at 19; Letter dated July 10, 2002 from J. Jeffrey Oxley, Eschelon, to Commissioner Marc Spitzer and Commissioner Jim Irvin, Arizona Corporation Commission at 5-8 (attached to WorldCom's Comments as Att. B).

7 *See* WorldCom Comments at 20.

8 *Id.*

9 *See* Supplemental Comments of AT&T Corp. ("AT&T Comments") at 38.

10 *Id.* at 7-8.

therefore, the state of competition in the States of Colorado, Idaho, Iowa, Nebraska and North Dakota. Because evidence of Qwest's conduct and the effects thereof are continuing to be uncovered as steadfast investigators find gaping holes in Qwest's line of defense, the state commissions may have been faced with a less complete record at the time they conducted their state proceedings.[11] Sufficient evidence now exists to demonstrate the unreliability of the record in this proceeding and, consequently, Qwest is unable to demonstrate that it meets the requirements of section 271.

B. The appropriate remedy is denial of the Application, not future enforcement.

Several of the state regulatory commissions contend there is no appropriate 271-related remedy to address the secret agreements matter and that the proper forum is in investigation/enforcement actions at the Commission or the relevant state commission.[12] With all due respect, the state commissions are wrong. As discussed above, and as demonstrated throughout the comments in this proceeding, Qwest's actions have corrupted the record in this proceeding such that Qwest cannot demonstrate that it has met the requirements of section 271. That being the fundamental inquiry of this proceeding, the Application must be denied, independent of any other enforcement proceedings or investigations conducted related to the secret agreements.

Indeed, the state commissions fail to demonstrate how future enforcement proceedings are the proper forum for this matter. For instance, the Colorado Commission stated that it has

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[11] For instance, the Colorado Commission states that the only agreements that were placed into the Colorado record were the five agreements that, at that time, had been revealed by the Minnesota Department of Commerce and that no evidence was presented as to whether any of those agreements related to the State of Colorado. *See* Colorado Comments at 4-5. Since that time, under its new "come clean" policy, Qwest has filed 11 agreements for approval with the State of Colorado. *Id*. at 3.

[12] *See* Colorado Comments at 6-9; North Dakota Public Service Commission Comments Regarding Late-Filed Interconnection Agreements of Qwest Communications International Inc. at 3; WUTC

commenced and will continue an investigation of the secret agreements and, at the end of such investigation (permitting for proper procedures), if the allegations of improper conduct are proven, "appropriate remedial actions will be taken."[13] By way of example, the Colorado Commission indicates that its remedial action may include disgorgement of the gains and benefits derived from the favorable discriminatory conduct.[14] Although Touch America wonders how the state commissions will quantify the ill-gotten CLEC gains (or losses for those "non-preferred" CLECs, many of which may no longer be in existence), that resulted from one carrier receiving, for example, superior provisioning service, this action does nothing to fix the fact that the record in this proceeding is broken and cannot be fixed without further inquiry and investigation. Denial of the Application is warranted, not future enforcement.

C. The states must not blindly believe that Qwest is now meeting its obligations.

The Iowa Utilities Board ("IUB") claims that the secret agreements problem is solved in Iowa and the Commission can now go ahead with approving the Application because Qwest has filed the agreements with the IUB and, with the exception of three agreements, the IUB has reviewed and acted upon each filed agreement.[15] As is demonstrated in the record, even if Qwest were to file each and every agreement, the fact remains that the record in this matter is both incomplete and tainted. Further, the comments make clear that the IUB must not blindly take Qwest at its word that it has filed each and every appropriate agreement with the IUB. Qwest has already demonstrated its proclivity to take liberties with its duty to file and make available its

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Comments at 2.

13 *See* Colorado Comments at 9.

14 *Id*. at 9, n. 21.

15 *See* Iowa Utilities Board Comments Regarding Late-Filed Interconnection Agreements of Qwest Communications International, Inc. at 2-5. Similarly, the Nebraska Public Service Commission and the Idaho Public Utilities Commission also filed comments indicating that Qwest had filed certain agreements for approval.

agreements to competitors. As the following examples demonstrate, Qwest continues to pursue this course:

- Qwest failed to reveal certain oral agreements that it had with CLECs and, in fact, denied the existence of such agreements until they were uncovered through the diligence and perseverance of regulators.[16]

- A&T has already identified more than half a dozen secret interconnection agreements that apply to one or more of the five states relevant to this proceeding that Qwest has not posted on its website.[17]

- In Arizona, Qwest stonewalled regulatory inquiries for months and, upon being forced to produce the agreements, the Arizona Corporation Commission staff found that at least 28 of Qwest's secret deals should have been filed.[18]

- Although Qwest states in its proposal that it is not filing "settlements of past disputes,"[19] the Arizona Commission has already determined that Qwest should have filed dozens of these so-called "billing settlement agreements."[20]

Although the speed with which the IUB has acted is commendable, Qwest's past conduct demonstrates that it must not be taken at its word without further review, investigation and inquiry.[21] Again, however, while Qwest's decision to file certain agreements with the state commissions is a step in the right direction, it does nothing to cure the effects of its past conduct on the record in this proceeding.

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16 *See* AT&T Comments at 3 ("[i]n at least two states, Qwest has denied the existence of oral agreements whose existence was subsequently unearthed by state investigators"); Comments of the Minnesota Department of Commerce at 2 ("[i]n June, 2002, the record was reopened to address claims that Qwest failed to file a twelfth agreement – an oral agreement with McLeodUSA to provide discounts of up to 10% on all services McLeod purchased from Qwest").

17 AT&T Comments at 4-5.

18 *Id*. at 27-28.

19 *See* Qwest proposal at 3.

20 *See* AT&T Comments at 4; WorldCom Comments at 11.

21 Indeed, although the IUB had requested Qwest some months back to provide copies of the agreements that were under investigation in the State of Minnesota, Qwest initially produced only 3 such agreements to the IUB and, only upon further order the IUB, did Qwest produce 11 additional agreements. *See* AT&T Comments at 27.

D. Qwest's actions were the result of deliberate decisions, not happenstance.

The Colorado Commission claims that the number of secret agreements suggests "[n]ot a systematic attempt by Qwest to discriminate between CLECs . . . but instead more mundane, run-of-the-mill carelessness and oversight."[22] Again, the facts show otherwise. For instance, investigators in Minnesota discovered an agreement whereby Qwest agreed to provide McLeod a discount up to 10 percent on all purchases it made from Qwest everywhere in the Qwest region in exchange for McLeod's agreement to abstain from opposing Qwest's 271 applications.[23] However, in an effort to prevent other CLECs from opting into this favorable discount provision, Qwest demanded that the agreement be oral and, to make it enforceable yet unidentifiable as a section 251/252 agreement, manufactured a scheme whereby the parties entered into a separate bilateral agreement for goods where the cross payments would result in McLeod receiving the 10% discount it had been promised.[24] In addition, the Arizona Corporation Commission, which continues its investigation, has so far concluded that at least 28 secret agreements – which are certainly considered to be more than a "handful"[25] – should have been filed.[26] This was a carefully contrived plan by Qwest to hide its agreement from other competitors, not mere inadvertence.[27] Make no mistake, Qwest did not act in a careless or inadvertent manner but, instead, made deliberate decisions and implemented fully-considered corporate strategies.

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22 *See* Colorado Comments at 10-11.
23 *See* WorldCom Comments at 12.
24 *Id*. at 13.
25 *See* Colorado Comments at 10.
26 *See* AT&T Comments at 4-5.
27 *See also id*. at 14 (Qwest had also initially offered Eschelon its 10 percent rate discount as part of an oral agreement to ensure that other CLECs would not be able to opt-in to the discount).

II. CONCLUSION

The secret agreements were brought to light over six months ago and four months before Qwest filed its Application. Qwest had the opportunity to address the secret agreements matter directly at that time but, instead, chose to stonewall the regulators and go forward with its Application, while also filing its Petition for Declaratory Ruling with the Commission so as to create a potential "other forum" – far away from the 271 context – for resolution of the matter. Notwithstanding Qwest's shenanigans, its actions have so tainted the record in this proceeding and the entire 271 process that Qwest is unable to demonstrate that it has met the 271 checklist requirements. Accordingly, Qwest's Application must be denied.

Respectfully submitted,

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August 30, 2002

CERTIFICATE OF SERVICE

I, Jane L. Hall, do hereby certify that on this 30th day of August, 2002, a copy of the foregoing Reply Comments filed on behalf of Touch America, in Docket No. 02-148, was served by U.S. Mail, postage prepaid, to the parties on the attached service list.

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